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Supreme Court, U.S.
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No. 99-1486

In The

Supreme Court of the United States

SAC & FOX NATION OF OKLAHOMA, et al.,

Petitioners,

v.

ANDREW CUOMO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

Federal Question Jurisdiction 1

Recusal of Assigned Judge..... 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bell v. Hood, 327 U.S. 678 (1946) 3

City of Ponca City v. Housing Authority of Kaw Tribe of Indians of Oklahoma, 840 P.2d 653 (Okla. 1992) 5

Duke v. Absentee Shawnee Housing Authority, 199 F.3d 1123 (10th Cir. 1999) 5

Green v. Branson, 108 F.3d 1296 (10th Cir. 1997) 7

Haneke v. Secretary of HEW, 535 F.2d 1291 (D.C. Cir. 1976) 6

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 7

Liteky v. United States, 510 U.S. 540 (1994) 9

Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975) 7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 2

United States v. Cooley, 1 F.3d 985 (10th Cir. 1993) 7

United States v. Pearson, 203 F.3d 1243 (10th Cir. 2000) 8, 9

STATUTES AND REGULATIONS

5 U.S.C. § 701, *et seq.* 6

28 U.S.C. § 455(a) 7, 8, 9

28 U.S.C. § 1362 7

24 C.F.R. § 950.101 4

TABLE OF AUTHORITIES – Continued

Page

24 C.F.R. § 950.102 3

24 C.F.R. § 950.200 5

24 C.F.R. § 1000.10 4

24 C.F.R. § 1000.302 ..... 3, 4

24 C.F.R. § 1000.326 4

63 O.S. 1991, § 1057 5

63 O.S. 1991, § 1054(f) 5

OTHER AUTHORITIES

63 Fed. Reg. 12334 (Mar. 12, 1998) 3, 4

Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330, Oct. 1996, 110 Stat. 4016) 3

Respondents,[1] the Federal Defendants and ASHA, have filed briefs in opposition to the petition for writ of certiorari. The Petitioners[2] hereafter respond to new points raised in the opposition briefs.

ARGUMENT

The Three Tribes' petition seeks review of a circuit court decision affirming a district court order dismissing their complaint for lack of jurisdiction and an order denying a motion to recuse. The complaint sought prospective injunctive relief in the nature of mandamus against the Federal Defendants, an injunction against ASHA, and declarative relief. Recusal of the assigned judge was sought because of an appearance of partiality arising from involvement in prior related litigation and management of the case.

Federal Question Jurisdiction

ASHA and the Federal Defendants assert that federal question jurisdiction does not exist "merely because federal funds are involved" or because ASHA has entered contracts with HUD. ASHA Br. at 12. These arguments do not address the material issues raised (however inartfully) by the complaint. The Three Tribes alleged that the

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[1] Andrew Cuomo as Secretary of the United States Department of Housing and Urban Development (hereafter "HUD"), Dom Nessi as Deputy Assistant Secretary for Native American Programs (hereafter "Nessi"), and Wayne Sims (hereafter "Sims") as Administrator of the Southern Plains Office of Native American Programs (hereafter "SPONAP") (hereafter collectively "Federal Defendants"); and the Absentee Shawnee Housing Authority (hereafter "ASHA").

[2] The Sac and Fox Nation of Oklahoma, the Housing Authority of the Sac and Fox Nation, the Citizen Potawatomi Nation, the Citizen Potawatomi Nation Housing Authority, the Kickapoo Tribe of Oklahoma, and the Housing Authority of the Kickapoo Tribe of Oklahoma, (hereafter the "Three Tribes").

Federal Defendants were violating federal law[3] and their ministerial duties and prayed for declarative and prospective injunctive relief. The issues raised by the allegations include:

> 1. Under federal law, can an Indian housing authority ("IHA") lawfully administer federal housing programs outside of the service area of its sponsoring tribe within the service areas of other tribes without their permission?
>
> 2. Does HUD have the authority under federal law to allocate federal funding to an IHA to administer federal programs in the service area of another tribe without its permission?
>
> 3. If HUD does not have authority under federal law to fund IHA operations that invade other tribes' service areas without permission, should a federal court prospectively enjoin HUD from continuing these violations of federal law?

Answers to these questions must come from interpreting federal statutes and federal regulations. Thus, "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will. be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). If the applicability of the federal statute upon which a plaintiff relies is genuinely at issue, "the federal courts possess jurisdiction and should reach the merits of the claim." *Id.* Where recovery is sought under the Constitution or the laws of the United States, a federal court must entertain the suit unless "the

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[3] The Federal Defendants wrongly state that this "case arises out of a dispute between three Indian tribes * * * and" ASHA. Fed. Defs. Br. at 2. This case arose out of a dispute between the Three Tribes and the Federal Defendants. *See, e.g.*, Pet. App. at 45, ¶ 25.

alleged claim under the Constitution or federal statues clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

ASHA dismisses the Three tribes' reference to 24 C.F.R. § 1000.302[4] as a valid federal question citation because it was adopted "almost a full year after the filing of the Three Tribes' complaint." ASHA Br. at 9. The NAHASDA regulation was cited in the Tenth Circuit Brief of Appellant because it was the law in effect when the brief was filed. A specific federal law cite was not earlier alleged for a number of reasons,[5] but most importantly because the District Court arbitrarily ended the jurisdiction discussion by entry of the July 7th stay order. The Three Tribes were precluded from fully exploring these issues before the district court. Had the Three Tribes cited prior HUD regulations, the Respondents would now be attacking the citations as law that is no longer in effect. Regardless of which regulation was cited, the same legal principle was applicable under the old and new law: In allocating federally-appropriated money, HUD has to determine where an Indian Housing Authority "is authorized to provide low-income housing." *Compare* definition of "Indian area" in the old regulation[6] and the new regulation.[7]

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[4] This is a section of the regulation (Part 1000) adopted to implement the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330, Oct. 1996, 110 Stat. 4016) (hereafter "NAHASDA"). 63 Fed. Reg. 12334 (Mar. 12, 1998).

[5] *E.g.*, when the Three Tribes filed suit, the old housing statutes and regulations would soon (within approximately five months) be superceded by NAHASDA.

[6] 24 C.F.R. § 950.102. Part 950 of title 24 of the Code of Federal Regulations is the regulation applicable to the "United States Housing Act of 1937, as added by the Indian Housing Act of 1988" and regulated how HUD "provides financial and

In making a determination of where an IHA "is authorized to provide low-income housing," SPONAP[8] may look to state law to decide where a state IHA is authorized to operate. However, even if SPONAP looks to state law in making a ministerial determination, the issue of the validity of that determination is still a "federal question." Whether SPONAP has properly allocated federal monies is always a federal question regardless of the laws relied upon by SPONAP in making the allocation decisions. Here, both federal and state law limited ASHA's service area to its sponsor's trust lands.

An IHA may operate only in "the geographic area over which an Indian tribe could exercise court jurisdiction or is providing substantial housing services and, where applicable, the Indian tribe or TDHE has agreed to provide housing services pursuant to a Memorandum of Agreement with the governing entity or entities (including Indian tribes) of the area[.] * * * " 24 C.F.R. § 1000.302 (emphasis added). Neither HUD nor ASHA has cited any law authorizing HUD to fund operations by a state IHA outside of its service[9] area nor produced any evidence that ASHA is only operating in its sponsoring tribe's service area or has entered a Memorandum of Agreement with any of the Three Tribes in whose services areas ASHA is operating.

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technical assistance to Indian Housing Authorities (IHAs) for the development and operation of lower income housing projects in Indian areas." *Id.* § 950.101, ¶ (a). Part 950 was "removed" when the NAHASDA final rule (Part 1000) was adopted. 63 Fed. Reg. 12334, 12349 (Mar. 12, 1998).

[7] *Id.* § 1000.10.

[8] HUD has "delegated authority to administer programs" under NAHASDA to SPONAP. 24 C.F.R. § 1000.10 (definition of "Office of ~~Native~~ American Programs").

[9] Indeed, HUD is violating the implicit restriction against funding two housing authorities for the same area. *See* 24 C.F.R. § 1000.326.

ASHA states that the Three Tribes "make a blatant attempt to mislead the court by misstating information concerning "service areas" and citing BIA regulations – not HUD regulations[.]" ASHA Br. at 13. However, ASHA does not refer to where the tribes made this alleged "blatant attempt to mislead the court." The Three Tribes have cited many different statutes and regulations. Whether a regulation is generated by HUD or by the BIA, HUD was required, prior to adoption of the NAHASDA final rule, to abide by the regulation when allocating federal housing monies to IHAs. *See* 24 C.F.R. § 950.200.

ASHA states that the Three Tribes have made "the untenable argument that the ASHA's jurisdictional boundaries are coextensive with the jurisdictional authority of the Absentee Shawnee Tribe" (ASHA Br. at 9) and that this is a "bizarre posture." *Id.* at 10-11.[10] This is not a "posture." It is the law. Artificial entities, such as ASHA, are controlled by the laws of their creation. ASHA was created at the request of its sponsor, the Absentee Shawnee Tribe of Oklahoma, whose governor appoints ASHA's board. 63 O.S. 1991, § 1057. ASHA's "area of operation" (service area) cannot be any larger than its sponsor's jurisdiction. *Id.* § 1054(f). *City of Ponca City v. Housing Authority of Kaw Tribe of Indians of Oklahoma*, 840 P.2d 653, 655 n.5 (Okla. 1992) ("it seems clear enough that * * * the phrase 'operating area of an Indian tribe, band or

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[10] ASHA's present attempt to distance itself from its sponsor conflicts with its earlier statements in this case. For example, the District Court dismissed this case, at ASHA's behest, on the alternative ground of "failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma." ASHA Br. at 3. In unrelated litigation, the ASHA successfully argued before the Tenth Circuit that "ASHA is an enterprise designed to further the economic interests of the Absentee Shawnee tribe, and the tribe has exclusive control over the appointment and removal of its decision makers." *Duke v. Absentee Shawnee Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999).

nation' * * * [means] the boundaries of a contiguous terrestrial territory over which an Indian tribe has some degree of autonomous authority – commonly referred to as sovereignty – which existed at the time the housing authority was created.").

The Federal Defendants argue that the Three Tribes "have failed, moreover, to identify any waiver of sovereign immunity that authorized their suit against the federal defendants to go forward." Fed. Defs. Br. at 7. First, suit immunity can be waived if not asserted. Although the Federal Defendants raised sovereign immunity in response to the Three Tribes motion for a preliminary injunction, they never raised sovereign immunity in response to the complaint because they never responded to the complaint. Second, had the Three Tribes been given an opportunity to respond to the Federal Defendant's brief in opposition to a preliminary injunction[11] or to such an assertion in a response to the complaint, they would have cited authorities supporting the proposition that "Sovereign immunity has never been considered a bar to mandamus seeking 'to compel public officials to adhere to the duties imposed upon them in their official capacities.' *Knox Hill Tenant Council v. Washington*, * * * 448 F.2d 1045, 1052 n.8 (1971)." *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1296 n.14 (D.C. Cir. 1976).

The Federal Defendants and ASHA emphasize that the Three Tribes told the Tenth Circuit that this action was not brought under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* ASHA Br. at 16; Fed. Defs. Br. at 7-8. SPONAP never advised the Three Tribes of the existence of any administrative remedies, but, instead, told them to seek resolution of the issues in "court."

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[11] The stay order entered 10 days after the filing of the Federal Defendants' brief precluded the filing of a reply brief which, in any event, was rendered moot by a denial of the motion on other grounds.

The resolution of this case will require the court to address HUD's oversight and funding of federal housing programs and interpretations of HUD regulations regarding Indian Housing Authorities. As such, "the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. *See Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 480-82 (10th Cir. 1975) (Federal question jurisdiction exists if the claim is founded upon federal law).

Recusal of Assigned Judge

ASHA extends § 455(a) beyond its plain wording and intent by implying that the Three Tribes must establish actual bias on the part of the Assigned Judge. ASHA Br. at 18. ASHA states that "baseless allegations are insufficient to require disqualification of the presiding judge" citing *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997). ASHA Br. at 21. However, the standard to be applied under 28 U.S.C. § 455(a) is that "a movant must show that a reasonable person, knowing all of the circumstances, would harbor doubts about the judge's impartiality." *Id.* (citing *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)). The promotion of "public confidence in the integrity of the judicial process" is an important policy. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). The elimination of even the appearance of impropriety is desirable. *Id.*, 486 U.S. at 860.

The Three Tribes sought recusal only after entry[12] of a *sua sponte* stay order that precluded any further discussion of jurisdiction, any amendments to the complaint,[13]

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[12] The Complaint was filed May 13, 1997. The stay order was entered July 7.

[13] Any request to amend the complaint prior to the Federal Defendants' response to the complaint thereto would have been premature. The Three Tribes reasonably assumed (prior to entry of the stay order) that the jurisdiction issue would not be fully

any response to outstanding discovery, and any further discovery. The filing of this unusual order prompted the Three Tribes to conduct the investigation that lead to the realization that the assigned district judge had served as U.S. Attorney when that office was defending the interests of the Absentee Shawnee Tribe against one of the Three Tribes involving similar issues in prior litigation including the precise issue of whether the Absentee Shawnee were an indispensable party.[14]

Contrary to ASHA's assertion that the Three Tribes' motion was untimely,[15] the Three Tribes moved for recusal as soon as they realized the district judge was involved in the prior litigation. Because the recusal motion was filed as soon as the Three Tribes learned the facts giving rise to the asserted basis for recusal, the motion was timely filed. *See, e.g., United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000). Although ASHA tries to imply bad faith in the timing of the Three Tribes' motion, the facts giving rise to the recusal motion were also readily available to the assigned judge. "When a judge fails to remove himself *sua sponte* under § 455(a), a party may ask the judge to recuse himself pursuant to

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joined until the principal defendants responded to the complaint. As it turned out, the Federal Defendants never responded. Thus, ASHA's argument that the Three Tribes should have attempted to "amend the complaint" (ASHA Br. at 22) is not, under the circumstances, valid.

[14] ASHA argues that the "most obvious difference" between the prior litigation "and this case is that the federal defendants in" the prior litigation "did not appeal the final District Court's decision to the Tenth Circuit as the U. S. Attorney has done in this matter." ASHA Br. at 20. In the prior litigation, two appeals were made to the Tenth Circuit. The Assigned Judge was the U.S. Attorney during the first appeal. The decision not to participate in the second appeal was made by the Assigned Judge's successor. The U.S. Attorney did not appeal "the final District Court's decision" "in this matter."

[15] ASHA Br. at 21.

that section." *Id.* (citing *Liteky v. United States*, 510 U.S. 540, 542-543 (1994)).

ASHA grossly exaggerates the Three Tribes' position by implying that the Three Tribes have attempted to characterize the district judge as seeking "revenge on any party who has been successful in litigation against the United States." ASHA Br. at 20-21. Cutting through the childish hyperbole, all the Three Tribes have asserted is that, under the circumstances, the district judge's impartiality "might reasonably be questioned." Questions regarding the district judge's involvement and motivations might have been resolved had the judge simply followed the requirement of § 455(a) and documented the reasons for denying the recusal motion and explaining the involvement in the prior litigation.

The Federal Defendants concede, as they must, that "the district judge 'did not create a record or document her decision not to recuse.' " Fed. Def. Br. at 10, n.5. Nevertheless, they attempt to justify this failure to comply with the clear mandate of § 455(a) because "the record does contain the representation of government counsel that Judge Miles-LaGrange was not actively involved in the prior litigation" quoting "to the best of **undersigned counsel's memory** at least from the time that he joined the U.S. Attorney's office in August of 1994,[16] * * * [the Assigned Judge], did not actively participate in the [prior] case, draft any pleadings, or argue any motions concerning the action." *Id.* (emphasis added). This representation is not adequate because U. S. Attorneys rarely, if ever, actually draft pleadings or argue motions. However, they presumably are the decision-

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[16] The "undersigned counsel" did not appear as attorney of record in the prior litigation until September of 1995. The prior litigation was filed in 1993 and the first appeal was decided in 1994. The Assigned Judge was sworn in as a judge October 8, 1994. *See* Pet. at 21. The "undersigned counsel was hardly competent to make a representation concerning the Assigned Judge's participation in the prior litigation.

makers in cases arising during their tenure in office and, as such, clearly advocates. *See* Pet. at 22, n.27. Even if this justification were adequate and supported by legal authority, the district judge did not rely upon the "representation of government counsel" regarding her activities in the related litigation. Instead, the judge denied the recusal motion "for the reasons stated in defendant Absentee Shawnee Housing Authority's September 15, 1997 response brief." App. 20. In any event, a judge should not be allowed to circumvent the requirement for a judge to create the judge's record representation of the involvement in related litigation. Certainly the requirement cannot be avoided simply because one of the parties who is not in a position to know makes a vague representation of the judge's involvement that the judge does not thereafter adopt or affirm.

CONCLUSION

The petition for certiorari should be granted and the Tenth Circuit decision affirming dismissal of the complaint and entry of the order denying recusal should be reversed.

Respectfully submitted,

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